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No. 03-690

Supreme Court, U.S.
FILED
DEC 2 - 2003
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

CHRISTIAN A. BERTOLI,

*Petitioner,*

v.

KENNETH OBERFELDER,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF FOR THE PETITIONER

MICHAEL D. SENNEFF
(*Counsel of Record*)
MARSHALL E. BLUESTONE
BONNIE A. FREEMAN
SENNEFF FREEMAN & BLUESTONE, LLP
50 Old Courthouse Square, Ste. 401
P.O. Box 3729
Santa Rosa, California 95402
Telephone: (707) 526-4250

*Attorneys for Petitioner*

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## REASONS FOR GRANTING THE WRIT

1. Respondent modifies the question presented by the petition to divert the Court from the impact of the Ninth Circuit's disregard for the qualified immunity standards outlined in *Saucier v. Katz*, 533 U.S. 194 (2001), *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Malley v. Briggs*, 475 U.S. 335 (1986). By focusing on the excessive force instruction as given, rather than on the qualified immunity issue urged by petitioner pre-trial (by motion for summary judgment), during trial (through jury instructions) and post-trial (upon motion for new trial after *Saucier* was decided), respondent has all but ignored the fundamental issue raised by the petition: when the facts are disputed such that a jury determination on excessive force is required after a Rule 50(a) motion was denied, why should an officer be barred from having disputed facts critical to a qualified immunity determination heard as well? As this Court instructed in *Saucier*, *supra*, 533 U.S. at 208, if "a reasonable officer in petitioner's position *could have believed* that [his life was threatened]", immunity exists. Should not the jury, rather than the trial court, make factual determinations of whether any reasonable officer could have believed as petitioner did that deadly force was justified in light of the mistaken split-second perception, or, conversely, that the officer was plainly incompetent or knowingly violated the law? After *Saucier*, the answer to this question is "yes."[1]

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[1] The Tenth Circuit, in a case published after petitioner's initial brief was filed, has correctly held that disputed facts regarding a government official's reasonable belief that he was not violating constitutional rights of a plaintiff was properly a jury question, when

(Continued on following page)

Respondent's failure to acknowledge in any way the significance of the jury's question during deliberations of how to analyze the issue of "self-defense" only serves to underscore its importance. If, as respondent contends, the jury simply disbelieved petitioner, why would the question have come up at all? Can it be said definitively that the district court correctly refused to allow the jury to consider the *disputed fact* regarding petitioner's perception at the time of the shooting? Is it so clearly outside the realm of possibility that, had the jury been instructed and petitioner allowed to argue, that only "plainly incompetent" officers or those who "knowingly violate the law" may be civilly liable, the jury could have considered the significance of petitioner's *reasonable, even if entirely mistaken belief* that his life was in danger? Instead, the jury was told that if petitioner intended to pull the trigger (rather than the gun going off by mistake or accident), then the

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disputed facts prohibited a pre-trial determination of qualified immunity. While the facts are not analogous to this excessive force case, the Tenth Circuit's discussion of the jury's role contradicts the Ninth Circuit's ruling below. *See, Maestas v. Lujan*, ___ F.3d ___, 2003 WL 22810441 at *3-*7 (facts may be so intertwined with the law that a jury question is appropriate as to whether a reasonable person in defendant's position would have believed constitutional right was not violated, emphasizing the jury's role in assessing the official's reasonable belief, since the doctrine of qualified immunity shields a defendant both from trial *and from damages*). In that case, the jury was asked to determine if the defendant's belief that he had a consensual relationship with plaintiff, rather than a coercive one in violation of Title VII and 42 U.S.C. §1983, would shield him from damages even if his belief was incorrect. While the instruction given in *Maestas* does not correlate to the instruction petitioner requested as it was not an excessive force case, the reasoning of the Tenth Circuit as to why such questions should be determined by a jury parallels the issue presented by petitioner's first question presented.

"intent" element for excessive force was met, and respondent argues that petitioner's "intent to pull the trigger" fully satisfies petitioner's qualified immunity inquiry. This cannot be the result intended when this Court held that qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant,* 502 U.S. 224, 229 (1991), *quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986). It protects *all*, not just some, of such officials; including petitioner. The district court clearly should have allowed the jury to determine the disputed fact as to whether either of these things were true of petitioner before denying the immunity, and should not have held, as it did in denying the motion for new trial, that the excessive force instructions satisfied the qualified immunity question.[2] The Ninth Circuit's endorsement of the district court's misapplication of the *Saucier* inquiry is a certworthy error.

Respondent also ignored the Fifth Circuit's Model Jury Instruction which incorporates the language petitioner requested in his proposed jury instruction. That instruction would have allowed the jury to find, as the jury did in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1988), that the elements necessary for a finding of excessive force were present, but still determine that petitioner's mistake

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[2] Respondent relies on semantics rather than fairness in suggesting that petitioner never requested that the jury be asked to decide the issue, because the proposed jury instruction stated that the immunity simply applies, rather than "actually *requir[ing]* the jury to make a finding of [plain incompetence] (whatever that may mean) or [knowing violation of] the law." (Resp. Br. 10, n.3.) Petitioner believes that the proposed instruction needs no such interpretation.

in the facts as perceived by him (his belief that his life was threatened by respondent driving his car toward petitioner) was not unreasonable, even if completely wrong. Just as with the officer in *Snyder* who shot a fleeing suspect in the back after mistakenly believing the suspect was armed (although it was clear that no weapon was ever found and, thus, the officer was mistaken about his perception), the jury found that the evidence supported a finding of an unconstitutional use of force, but also found that the officer was neither "plainly incompetent nor knowingly violated the law" and thus was immune from damages for his conduct. Petitioner is entitled to the same jury inquiry.

It is impossible to reconcile the jury's inquiry regarding self-defense with respondent's statement that the jury *was* asked (apparently implicitly) to determine whether petitioner was reasonably mistaken that his life was in danger, and "found that respondent had proved by a preponderance of the evidence that the answer to the question was 'no.'" (Resp. Br. 11) The instruction to the jury regarding the meaning of "intentional," and the absence of an award of punitive damages by the jury when it was instructed such damages were appropriate if the conduct was intentional, supports petitioner's claim that the jury should have been allowed to consider the disputed question of whether petitioner was plainly incompetent or knowingly violated the law.

2. Respondent urges that the Ninth Circuit decision should not be reviewed by this Court because the decision in which it turned this Court's earlier pronouncements on their head was unpublished. It is true that the "anonymous" nature of an unauthored, unpublished decision presents precedential problems, but the Supreme Court

Rules do not prohibit review of such decisions on this basis.[3] The law which was applied by the Ninth Circuit is wrong, and the decision will have ramifications on other decisions within and outside the circuit for the "firsts" that it pronounces: That where facts are disputed, law enforcement officers who are accused of an unreasonable use of deadly force are not entitled to qualified immunity at any stage of the litigation. As with all "unpublished" decisions, the case is reviewable in the Westlaw database, is cited in West Group's "Federal Appendix" directory[4], and its reasoning may be adopted by the Ninth Circuit in any other published decision if it believes that the reasoning supporting the Court's decision reflects a correct statement of law. If it does not reflect a correct statement of law, petitioner becomes a sacrificial lamb to the Ninth Circuit's qualified immunity jurisprudence, and this Court has jurisdiction to correct the misstatement before it is adopted by any other panel, or circuit.

3. Apparently uncomfortable with the fact that a $333,000[5] windfall fee enhancement was awarded to respondent on the sole basis that he was incarcerated at the time his suit was filed, respondent asserts that the issue was "waived" by petitioner, an assertion which deserves careful scrutiny.

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[3] The fact that a court of appeals has ordered that its opinion not be published is no bar to Supreme Court review. See, *Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 34 (1975).

[4] 67 Fed.Appx. 408 (9th Cir. 2003)

[5] Respondent describes the enhancement as "modest," even though it eclipses the damages award of $100,000 three-fold.

The entire basis for the fee multiplier came from the Oberfelder letter (Pet. App. at 46a-47a) requesting appointment of counsel. The letter was not accompanied with a proof of service, and in fact was never served upon or produced to petitioner until it accompanied the post-trial motion requesting the attorney fee enhancement. The district court's order appointing counsel made no reference to a letter having been received, or for the basis of its decision to appoint counsel for petitioner. (Patel Order of 9/18/98) Petitioner could not have "timely raised [objection] in the trial court" because respondent never "timely" produced the letter forming the basis of the appointment. Respondent's rationale that "only in opposition to the motion for attorney's fees . . . did petitioner for the first time, question the adequacy of the evidence that respondent would not have been able to obtain counsel" is true, but respondent's failure to inform petitioner of the facts giving rise to the appointment (and, consequently, the enhancement) cannot be deemed to constitute a waiver by *petitioner*. It was "only" then raised, because the issue was only "then" disclosed to petitioner. Once disclosed, petitioner raised evidentiary objections to the respondent's misstatements about and reliance on the unauthenticated letter, which objections were ignored by the district court. Petitioner raised the same objections in the Ninth Circuit which were again ignored, and not mentioned in the opinion upholding the enhancement.

Respondent is incorrect in stating that this claimed "waiver" poses procedural grounds to deny the petition. Respondent is left, then, with his sole argument that the enhancement did not constitute an abuse of discretion. Urging a liberal interpretation of the actual words from the Oberfelder letter, respondent claims that the letter

establishes an "inability to contact counsel" (Resp. Br. 14) when the letter states exactly the opposite: that Oberfelder had a "team" of private attorneys who were "focusing on his criminal matters" and, once they were done, he could "perhaps" focus on the civil case. (Pet. App. at 46a-47a) It further carries on the exact error that petitioner claims the Ninth Circuit committed by its "explanation that when counsel is appointed rather than retained, market forces that normally ensure the *reasonableness of the lodestar* do not come into play," thereby justifying the *enhancement*. (Resp. Br. 14.) The enhancement was not required, however, to "ensure the reasonableness of the lodestar" which had already been acknowledged as "reasonable" by respondent and his experts, and which was predicated on the highest number of hours at the highest market rate.

Similarly, petitioner did not waive his argument that the Ninth Circuit's singular ruling that an enhancement of $333,000 was appropriate amounts to a violation of petitioner's due process rights under the Fourteenth Amendment. As the briefing in the Ninth Circuit indicated (and which respondent did not dispute), there were no decisions upholding a multiplier in a civil right's case in the Ninth Circuit since *Guam Soc. Of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691 (9th Cir. 1996). Upholding the multiplier in this instance, in the face of uncontroverted evidence that the lodestar *was* reasonable without any adjustment, irreconcilably conflicts with this Court's directive in *Blum v. Stenson*, 465 U.S. 886, 898 (1984), requiring that the fee applicant establish that "such an adjustment is *necessary* to the determination of a reasonable fee." It flies in the face of Ninth Circuit authority holding that where the "[applicant] introduced no evidence

that an enhancement was necessary to provide fair and reasonable compensation" it is inappropriate to provide an upward adjustment to the lodestar fee (*Jordan v. Multnomah County*, 815 F.2d 1258, 1264 (9th Cir. 1987). The resulting windfall endorsed by the Ninth Circuit results in a due process deprivation similar to those raised and visited by this Court in the punitive damage context, only more egregious. The constitutional implications arise from the Ninth Circuit's ruling, no other, and thus have been raised at the first instance in this petition. The interests of justice support a review of the plain error evident from the Ninth Circuit's opinion upholding a far-from-modest fee enhancement when not necessary for determination of a lodestar fee award.

The two questions raised by the petition both involve areas of 42 U.S.C. Section 1983 litigation which are badly in need of the Supreme Court's authoritative voice. Qualified immunity arises with virtually every excessive force case filed, and in most civil rights cases. There has never been direction from this Court as to the jury's role on the determination of qualified immunity when factual disputes exist, and to what extent a trial judge must allow the jury to resolve such disputes before making a qualified immunity ruling.

It is not unusual for 42 U.S.C. §1983 cases to be filed by incarcerated persons. Is it to be that the incarcerated plaintiff is entitled to greater recovery than one not guilty or convicted of a crime whose constitutional rights have been violated? The Ninth Circuit would have it so; certainly, the issue is one of national import, not only to attorneys defending such suits, but to every public employee susceptible of falling within the umbrella of "color of law."

In the area of law enforcement, where many of the 42 U.S.C. §1983 cases arise, fundamental fairness requires that *stare decisis* be deferred to when dealing with qualified immunity law and with the law governing attorney fee awards, both areas having been snubbed by the Ninth Circuit. The resulting "punitive" award of $333,000 is unduly harsh, and should be reviewed before similar such windfalls follow.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL D. SENNEFF
(*Counsel of Record*)
MARSHALL E. BLUESTONE
BONNIE A. FREEMAN
SENNEFF FREEMAN &
BLUESTONE, LLP
50 Old Courthouse Square,
Ste. 401
P.O. Box 3729
Santa Rosa, California 95402
Telephone: (707) 526-4250

*Attorneys for Petitioner*